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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-820

GENERAL MOTORS CORPORATION,
Petitioner
v.
IONE JENKINS,
Respondent

RESPONSE AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent IONE JENKINS hereby responds to and submits this her Brief in opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, as follows:

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on June 30, 1971, reported at 446 F. 2d 377 (5th Cir. 1971) appears in Appendix I hereto. No opinion was rendered by the District Court for the Northern District of Georgia.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 30, 1971. (App AII) A timely petition for rehearing and rehearing en banc was denied on September 24, 1971. The denial of the petition for rehearing and rehearing en banc appears as Appendix III hereto.

Respondent agrees that Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

This response and brief is timely filed pursuant to the provisions of Rule 24 of the Rules of this Court.

QUESTIONS PRESENTED

Respondent notes the questions presented in Petitioner's Petition for a Writ of Certiorari and will comment on them later in the presentation of Respondent's argument and citation of authorities as to why the Writ should not be granted.

STATUTES INVOLVED

Respondent acknowledges that the statutes claimed by petitioner to be involved are correctly set forth in the Petition; however, respondent denies that the same are involved.

STATEMENT OF THE CASE

The first paragraph of Petitioner's "Statement of the Case" is correctly stated.

Respondent vigorously disagrees with petitioner that there is any question of legal insufficiency of the evidence was wholly sufficient to support the verdict. Respondent likewise disagrees with the Petitioner when Petitioner urges that the verdict was

> "based solely on expert opinion when (a) the opinion is contradicted by the undisputed physical evidence and (b) the jury was required to engage in unrestrained speculation in order to supply missing evidentiary elements necessary to establish the cause of action".

In these assertions, Petitioner is merely rearguing and rehashing the contentions it made throughout the trial and appeal of this case, all to no avail.

The verdict was not based solely on expert opinion, as will be hereafter argued by Respondent, nor was the opinion of Respondent's experts contradicted by the undisputed physical evidence, the opinions of Respondent's experts being in fact supported and corroborated by uncontradicted physical evidence and testimony. Nor was the jury required to engage in unrestrained speculation for there was solid, undisputed evidence upon which the jury was authorized to conclude, as they did, in favor of Respondent, as will hereafter be adverted to in Respondent's argument.

The Petitioner's statement in its "Statement of the Case" to the effect that

> "The dispute turns on the role of court and jury in the federal system when deciding claims arising under state law"

is not warranted in this case, there being no dispute in Respondent's view, the question being solely and simply:

> WAS THERE SUFFICIENT EVIDENCE TO AUTHORIZE THE SUBMISSION OF THE CASE TO A JURY AND TO AUTHORIZE THE SUBMISSION OF THE CASE TO A JURY AND TO AUTHORIZE THE JURY'S FINDING THEREIN?

By way of further amplification of the Statement of the Case, Respondent calls to the Court's attention that the accident which was the subject occurrence of this case, took place within the geographical limits of the State of Georgia and thus the lex loci delicti is the State of Georgia.

ARGUMENT

Respondent would first in her argument take issue with some glaringly incorrect and misstated portions of the Petition, e.g. at page 9 of the Petition it is asserted that the Fifth Circuit Court of Appeals limited its review of evidence on appeal to the

> " 'evidence and all inferences most favorable to the party against whom the motion [for directed verdict and j.no.v.] is made' . . . thereby rejecting the Boeing rule that 'the Court should consider all of the evidence — not just the evidence which supports the non-mover's case.' *Boeing Co. v. Shipman*, 411 F. 2d at 374 & 375 n. 16".

A reference to Appendix AI-4 of the Petition and of this response and brief shows clearly that such was not the case, but on the contrary that the Fifth Circuit did follow the rule in Boeing when the Fifth Circuit declared,

> "On motions for directed verdict and J.N.O.V. the trial court, and a reviewing court, must view *the* evidence and all inferences most favorable to the party against whom the motion is made."

Citing Boeing v. Shipman. The Fifth Circuit obviously followed the rule in Boeing in reviewing all of the evidence and not just that evidence favorable to the non-mover's cause. (Emphasis supplied)

Another such incorrect assertion appears at page 9 of the petition as follows:

> "(2) The scope of permissible jury inferences was expanded from the implicit *Boeing* limitation of those inferences reasonably supported by the evidence to the less restrictive FELA rule which has been recognized as allowing significantly more jury freedom than in common law negligence actions. See *Missouri-K.-T. Ry. v. Hearson, supra,* at 1040; *Boeing Co. v. Shipman,* 411 F. 2d at 371; *Chicago, R.I. & P.R.R. v. Melcher,* 333 F.2d 996, 999-1000 (8th Cir. 1964)."

Once again, a reference to Appendix AI-6 of the petition and of this response and brief shows clearly that the Fifth Circuit cited the cases of *Remington Arms Company, Inc. v. Wilkins,* 38 7F.2d 48, 54, and *American Cyanamid Company v. Fields,* 204 F.2d 151, 153, simply in support of the proposition asserted by the Fifth Circuit, viz.,

> "The jury was not bound by the appellant's evidence, nor forced to accept the testimony of its experts, even if uncontradicted."

that the cases of *Lones v. Detroit, Toledo & Ironton Railroad Co. and Equitable Life Assur. Society of the United States v. Fry* were cited by the Fifth Circuit simply in support of its finding, viz.,

> "The jury was authorized to make reasonable inferences even if some speculation and conjecture was required."

Thus respondent submits there is no departure from the rule in Boeing for the rule in Boeing clearly states that "On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence — not just that evidence which supports the nonmover's case — *but in the light and with all reasonable inferences most favorable to the party opposed to the motion.*" (Emphasis supplied)

Petitioner has also departed from a correct analysis of the opinion of the Fifth Circuit at page 10 of the Petition when petitioner asserts:

> "(3) The standard applied in the instant case was expressed as 'an absence of probative facts to support the conclusion reached by the jury.' This expression is virtually identical to the FELA rule as defined in *Planters and Lavender v. Kurn:* 'A complete absence of probative facts to support the conclusion reached.' Boeing had expressly rejected this standard. *Boeing Co. v. Shipman,* 411 F.2d at 370."

A reference to Appendix AI-6 of the Petition and of this response and brief discloses, without doubt, that the Fifth Circuit, in the use of the language adverted to, was not applying a standard but was merely disagreeing with appellant's contention when the Court said: "We reject

appellant's contention that there was an absence of probative facts to support the conclusion reached by the jury."

Petitioner, then, at the bottom of page 12 and top of page 13 of its Petition states:

> "Petitioner does not intend to suggest through this petition that the Supreme Court burden itself with review of questions limited to the sufficiency of the evidence to support a verdict."

But the Petitioner says, at page 14 of its Petition:

> ". . . but subsequent cases, including the present one, indicate abandonment of the standard determined there."

(in Boeing) And at page 15 of its petition:

> "It is demonstrable from the record that not even a scintilla of evidence, other than the bare assertions of plaintiff's experts, support the verdict."

So, it is obvious that petitioner is asking this court to "burden itself with review of questions limited to the sufficiency of the evidence to support a verdict".

Petitioner repeatedly argues that respondent's only evidence was the opinions of respondent's expert witnesses and that these opinions were unsupported and contradicted by undisputed physical facts.

By such assertions, petitioner is seeking to transmute by some perverse legal alchemy the base metal opinions of its own experts into gold merely by calling such opinions of its own experts "undisputed physical facts".

The truth is, as the Fifth Circuit noted, in its opinion at Appendix AI-5 of the Petition, and of this response and brief,

> "It all boils down to a battle of experts and, as such, the trial court did not err in submitting the case to the jury."

The Fifth Circuit obviously relied heavily also on the undisputed testimony of respondent herself who was a passenger in the car and that of her host driver, Billy Mixon, that something untoward happened durnig the normal otherwise uneventful operation of the automobile, viz., that it "suddenly veered to the left and became uncontrollable," and that respondent and her said host driver, Billy Mixon, were the only eyewitnesses to the occurrence. (See opinion of the Fifth Circuit in Appendix A1-2 of the Petition and of this response and brief). Surely such uncontradicted eye-witness testimony of the respondent and of her host driver cannot be equated with petitioner's assertions that the opinions of respondent's expert witnesses were unsupported and contradicted by undisputed physical facts.

The Circuit Courts of Appeal undoubtedly have manifested a contrariety of opinions in applying the standard to be applied in determining the legal sufficiency of the evidence to authorize submission of a case to the jury and to support the jury's findings in a case. However, this court has consistently declined to intervene with the grant of Certiorari. *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959); *Mercer v. Theriot*, 377 U.S. 152 (1964).

This Court, apparently, has concluded that as long as the rule in *Erie Railroad Co. v. Tompkins*, 304 U.S.

64, 58 S.Ct. 817, 82 L.Ed 1188 is viable in diversity cases, requiring the application of the substantive law of the various states, there is bound to be such contrariety, but without working any injustice to anyone.

This is no case for the grant of Certiorari, Respondent respectfully submits, and urges, for the following key and substantial reasons:

1. Georgia, being the lex loci delicti, in this case, the Petitioner was entitled to no more and no less than accorded to it by the substantive law of Georgia. Petitioner had its rights thereunder throughout the trial of the case in the District Court below. If the substantive law of Georgia had been applied to Petitioner's appeal in the Fifth Circuit, Petitioner would have been confronted with and subjected to the law of Georgia, viz., that the court on appeal would view only such evidence as was favorable to the non-mover's side and giving the non-mover the benefit of all inferences and deductions from such evidence and affirm for the non-mover if there was any evidence at all, i.e. a scintilla, to support the non-mover's case. In determining the question, the evidence must be construed in its light most favorable to the party against whom it was directed. *Everett v. Miller*, 183 Ga. 343, 188 S.E. 342; *Curry v. Robertson*, 87 Ga. App. 785, 75 S.E. 2d 282. Where the evidence may be subject to more than one construction, or where more than one inference may be drawn, even from undisputed facts, the duty of solving the mystery should be placed upon the jury. *Northwestern University v. Crisp*, 211 Ga. 636, 88 S.E. 2d 26. Where there is an evidentiary basis for the jury's verdict, the jury being free to discard or disbelieve whatever facts were inconsistent with their conclusions, it is error for

the court to substitute its conclusions for those of the jury and enter a judgment n.o.v.; and on such a motion, the evidence must be accepted which is most favorable to the party in whose favor the verdict was rendered. *Echols v. Thompson*, 211 Ga. 299, 303, 85 S.E. 2d 423.

2. Petitioner concedes in its Petition, at page 10:

> "Petitioner respectfully submits that the Fifth Circuit adopted the proper rule in *Boeing Co. v. Shipman*, 411 F.2d at 374-75".

Petitioner was given far more rights under the Boeing rule than it would have been given under the Georgia substantive law as to the view of the evidence on appeal, the Boeing rule requiring that *all* of the evidence be reviewed by the court and that there must be a conflict in substantial evidence to create a jury question. Therefore, Respondent respectfully submits that Petitioner is not aggrieved in any respect and has been afforded full justice in the premises.

3. The verdict and judgment in this case has received the imprimature of the distinguished District Trial Judge, of an affirmance by the Fifth Circuit Court of Appeals and of a denial by the Fifth Circuit of a Petition for Rehearing and a Rehearing En Banc, all of which has afforded, in full, an unquestioned safeguard of all of petitioner's rights in the premises.

4. Petitioner is merely seeking to have this Court review the evidence and determine whether the Boeing rule was applied as is manifest at page 14 of the Petition wherein Petitioner says: "Petitioner contends that the Fifth Circuit took an appropriate step in this direction in its *Boeing en banc* opinion, but subsequent cases, in-

cluding the present one, indicate abandonment of the standard determined there."

5. Petitioner has not shown any important substantial or compelling reason, either as to Petitioner's standing as a litigant, or as to any effect on the public why Certiorari should be granted in this case, but is misusing the procedure of applying for Certiorari in an effort merely to use this case as a vehicle and medium hoping to get this Court to hear a rehashing and reargument of all of petitioner's arguments which have heretofore been wholly rejected by the trial and appellate courts below.

6. The Boeing rule, which Petitioner acknowledges to be the proper rule, was applied in this case in the Fifth Circuit. By the application of such rule, petitioner was afforded more rights than it would have been under any other rule applied by any other Circuit Court of Appeal and, therefore, Petitioner was afforded more rights rather than less rights, has nothing of which to complain in this Court, and even if Certiorari were granted in this Court in this case, there would be a complete absence of effect as to the result in this case in the premises.

CONCLUSION

Petitioner has not made out a case in its Petition for a Writ of Certiorari sufficient to cause this Court, in the exercise of its sound judicial discertion, to grant the Writ sought as no special and important reasons for the grant of such Writ appear. Petitioner is merely complaining to this Court in its said Petition that it does not like the result it obtained in the trial of this case in the District Court and in the Fifth Circuit and is trying,

on the pretense of straightening out some conflicts in the Circuit Courts of Appeals, to get this Court to grant such Writ after which Petitioner would then try to persuade this Court to re-try its case on appeal. Such is not the office of a Writ of Certiorari and respondent urges this Court not to allow Petitioner such Writ based on the flimsy reasons advanced therefor in its Petition. If this Court grants the Writ of Certiorari in this case, it will open a Pandora's box because there are hundreds of thousands of litigants who are dissatisfied with the results below and would like to have one last shot at it in this highest of all Courts.

WHEREFORE, Respondent prays, submits and respectfully urges this Court to deny Petitioner's said Petition for a Writ of Certiorari.

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Certificate of Service

I certify that I have served a copy of the foregoing Response and Brief of Respondent upon counsel of record for Petitioner by depositing the same in the United States Mail with sufficient postage affixed thereto, and addressed as follows:

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I further certify that all parties required to be served have been served.

This _____ day of January, 1972.

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Of counsel for Respondent

APPENDIX

(Opinion, Judgment and Denial of Rehearing of Court of Appeals)